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In the Supreme Court of the United States

OCTOBER TERM, 1948

COMMISSIONER OF INTERNAL REVENUE, Petitioner

v.

WILLIAM I. CONNELLY AND BERTHA CONNELLY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled cause on January 24, 1949.

OPINIONS BELOW

The findings of fact and the opinion of the Tax Court (R. 31-40) are reported at 8 T.C. 848. The opinion of the Court of Appeals (R. 54-59) and the dissenting opinion of Judge Edgerton (R. 59) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1949. (R. 60.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The taxpayer, while holding a Civil Service position with the Coast Guard at its headquarters, became enrolled as a full-time temporary member of the Coast Guard Reserve in the classification known as "Coast Guard Civil Service Employees", and served without compensation other than the compensation of his civilian position which he continued to hold throughout his enrollment.

The question presented is whether the taxpayer was entitled to exclude $1,500 from his taxable income for the years 1943 and 1944 under the provisions of Section 22(b)(13)(A) of the Internal Revenue Code which grants such an exclusion from compensation received for active service as a commissioned officer in the military or naval forces.

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the statutes and regulations involved are set forth in the Appendix, *infra*, pp. 13-17.

STATEMENT

The taxpayers are husband and wife, residing in Falls Church, Virginia. In 1943, William I. Connelly, who will hereafter be referred to as the

taxpayer, was a Civil Service employee of the United States, serving in the Legal Division of the Coast Guard. In February, 1943, the taxpayer was enrolled as a temporary member of the Coast Guard Reserve for the duration of the war, and was ordered to full-time duty at Coast Guard Headquarters in Washington, D. C. By the terms of his enrollment, the taxpayer was to receive no pay or allowances other than the compensation of his civilian position which he continued to hold, and his duties were to be performed in the classification known as "Coast Guard Civil Service Employees". (R. 16, 19-20, 32, 33-34.)[1]

At the time of his enrollment, the taxpayer's Civil Service position was grade P-5 and he was enrolled in the Reserve with the rank of Lieutenant Commander. In April, 1944, his Civil Service position was reclassified to grade P-6. He was thereupon disenrolled from his rank of Lieutenant Commander and was re-enrolled with the rank of Commander. (R. 33-34.)

During the period of his enrollment, the taxpayer continued to receive compensation for his services at the applicable Civil Service professional rates, which was paid from appropriations allocated to the payment of salaries of Civil Service positions. As in the case of other civilian em-

[1] For a description of the temporary classes of the Coast Guard Reserve during the war see *Mitchell* v. *Cohen*, 333 U. S. 411, 413-414.

ployees, the taxpayer was subject to Civil Service regulations covering annual and sick leave, deductions for Civil Service retirement were taken from his pay, and he received over-time compensation for work performed in excess of 40 hours of service per week. (R. 33.) In the case of injury in the line of duty, the taxpayer was entitled to the same benefits as Civil Service employees of the United States; in the case of sickness contracted while performing duty, he was entitled to the same hospital and medical treatment afforded members of the regular Coast Guard. (R. 35.) His temporary enrollment in the Coast Guard Reserve did not exempt the taxpayer from induction under the Selective Service and Training Act and, apparently, his disenrollment could be secured at his own convenience, as well as on the initiative of the Coast Guard. (R. 33-34, 35-36.) While on active duty, the taxpayer was vested with the same power and authority as members of the regular Coast Guard of similar rank. He was also subject to the laws, regulations, and orders for the government of the Coast Guard and to disciplinary action for offenses committed while so subject. (R. 34.) The taxpayer was disenrolled in September, 1945. (R. 35-36.)

The taxpayer received total civilian pay of $5,872.04 in 1943, $5,802.08 in 1944. In his tax return for each year, he claimed an annual exclusion from income of $1,500 under Internal Reve-

nue Code, Sec. 22(b)(13)(A), which was disallowed by the Commissioner of Internal Revenue. (R. 36.) The Tax Court held that the taxpayer was not entitled to the exclusion. (R. 36-40.) The Court of Appeals, Judge Edgerton dissenting (R. 54-59), reversed the decision of the Tax Court.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the taxpayer was entitled to the $1,500 exemption provided in Section 22(b)(13)(A) of the Internal Revenue Code.

2. In disregarding and failing to follow the holding and opinion of this Court in *Mitchell* v. *Cohen*, 333 U.S. 411, and in following its own opinion in that case, 160 F. 2d 915.

3. In reversing the judgment of the Tax Court.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the District of Columbia Circuit, relying on its own opinion in *Mitchell* v. *Cohen*, 160 F. 2d 915, and ignoring the reasons which prompted this Court to reverse that decision (333 U.S. 411), has again extended to temporary members of the Coast Guard Reserve one of the series of special benefits which Congress has granted to persons who served in the armed services during the war—in this case the exclusion from taxable income of $1,500 provided for in Section 22(b)(13)(A) of the Internal Revenue Code (Appendix, *infra*, pp. 15-16). Unless reversed, the

decision will stand as a precedent respecting the tax liability of some hundreds of persons who were enrolled as temporary members of the Coast Guard Reserve on the same basis as the taxpayer. And if the Court of Appeals, ignoring what was reversed and repudiated in the *Cohen* case, should continue—as it did here and as it announces its intention to continue (R. 57)—to rely on its own opinion in that case, there is the constant danger that other statutory benefits intended for full-fledged servicemen will be erroneously extended by it to persons in the class of the taxpayer. Above all, the decision of the Court of Appeals, in its refusal to follow the plain teaching of this Court's opinion in the *Cohen* case, has a decidedly erosive effect on the precedential value of this Court's decisions, and this Court's supervisory authority should be exercised in the interest of the proper administration of justice in the federal courts.

1. Section 22(b)(13)(A) of the Internal Revenue Code, granted an exemption from income tax to the extent of $1,500 of compensation received "for active service as a commissioned officer * * * in the military or naval forces of the United States * * *." The court below concluded that the taxpayer, who became enrolled as a temporary member in the Coast Guard Reserve in the "Coast Guard Civil Service Employees" classification, was entitled to this exemption even though he continued to hold his Civil Service position with the

Coast Guard, continued to receive his full Civil Service salary (including overtime) out of funds appropriated for such purposes, concededly received no military pay, and continued to do essentially the same kind of work that he had performed prior to his enrollment—all in accordance with the explicit understanding at the time of his enrollment. Refusing "to ascertain an unexpressed intendment in the revenue act" (R. 58), the Court of Appeals rested its decision solely on the taxpayer's status as a commissioned officer in the naval forces. In doing so, the court expressly applied the criteria which it had applied in the *Cohen* case, and declared its continued adherence to those views for purposes other than the precise statute involved in that case, flatly asserting that this Court, except for that particular act, did not reject or question those standards "for the determination of status, as civilian or military, generally" (R. 57).

Actually, this Court's opinion in the *Cohen* case, in the plainest manner possible, ruled that the question of "status" was beside the point, and that the Court of Appeals had misconceived the issue when, looking only to the difference between civilian and military status, it blindly applied the literal words of the Veterans Preference Act of 1944, c. 287, 58 Stat. 387, to confer preferential rights on part-time, temporary members of the Coast Guard Reserve. This Court thought it im-

material that Cohen had rendered part-time active service in a branch of the armed forces and was therefore an ex-serviceman within the literal words of the statute. Instead, the Court measured the military services performed by these temporary reservists against the purposes which prompted Congress to establish this preferential treatment, and concluded that Congress did not use the statutory term "ex-servicemen" in that Act in its broadest sense, and that, instead, the benefit was granted (p. 421)—

> only to those who performed military service on full-time active duty with military pay and allowances, thereby dislocating the fabric of their normal economic and social life. * * *

2. The rationale of the *Cohen* decision unquestionably compels a comparable result in the present case. Just as with the Veterans Preference Act, the legislative purpose of the related statutes involved here makes it evident that Congress did not intend this special tax exemption to be available to persons, like the taxpayer, who were receiving civilian pay, who were still performing essentially the same functions, and who were not subject to major dislocations in their normal civilian affairs. Instead, because of the financial sacrifice made by most persons who entered the armed services, the statute was primarily supposed to constitute some measure of relief against the general disparity in the levels of civilian and military compensation. The exclusion was designed "to

assist a member of the military forces to enable him to meet the problem of taxation arising from his transition from a civilian to a military status"; it was to be applicable only with respect to compensation received for services performed in the military or naval forces, being "limited to income derived entirely from * * * service as a member of the military or naval forces" and not being applicable to income received by a serviceman "in addition to his military or naval pay." 89 Cong. Rec. 2754-2755. See also: H. Rep. No. 2333, 77th Cong., 2d Sess., p. 6 (1942-2 Cum. Bull. 372, 376), and S. Rep. No. 1631, 77th Cong., 2d Sess., p. 81 (1942-2 Cum Bull. 504, 566) (reporting on the Revenue Act of 1942, where a special exemption, limited to personnel below the grade of commissioned officers, first originated); H. Rep. No. 268, 78th Cong., 1st sess., pp. 12-13, 26-27 (reporting on H. R. 2218); H. Rep. No. 401, 78th Cong., 1st sess., pp. 21, 41 (1943 Cum. Bull. 1283, 1299, 1313), and S. Rep. No. 221, 78th Cong., 1st sess., pp. 13-14, 47-48 (1943 Cum. Bull. 1314, 1324, 1349) (reporting on the Current Tax Payment Act of 1943); S. Rep. No. 655, 79th Cong., 1st sess., pp. 34-35 (1945 Cum. Bull. 621, 648), and H. Conference Rep. No. 1165, 79th Cong., 1st sess., p. 8 (1945 Cum. Bull. 654, 655-656) (reporting on the Revenue Act of 1945).

Section 207 of the Coast Guard Auxiliary and Reserve Act of 1941 (Appendix, *infra*, pp. 13-14),

under the terms of which the taxpayer was enrolled, is the same statute which was involved in the *Cohen* case. Its legislative history and the incidents of temporary enrollment in the Reserve plainly show that persons in the position of the taxpayer were no more entitled to the special tax exemption here involved than the part-time temporary reservists were entitled to the employment preference involved in the *Cohen* case. The phrase in Section 207 of the Coast Guard Reserve Act permitting enrollment of "Government employees without pay other than the compensation of their civilian positions" was expressly inserted to make it clear that these employees could serve "without military pay but with continuance in their civilian positions and the receipt of compensation thereof." H. Rep. No. 2525, 77th Cong., 2d sess., p. 3 (1942). The report significantly continues by saying that, in permitting service of such Government servants "without the pay of their military rank or rating", the statute would not interfere with their right "to receive the compensation of their civilian positions" and that there would "be little, if any, change in the nature of their duties after enrollment." The primary purpose was to give these civilian employees "military authority and responsibility." It is indisputable, therefore, that the Act under which the taxpayer was enrolled specifically denied him the military pay with which alone the income tax exclusion was concerned.

We need add little to the further factors enumerated in the *Cohen* case, most of which are also applicable to the taxpayer, except to observe that persons, like the taxpayer, who continued to draw the full Civil Service pay of their civilian position in the Government, can scarcely have been considered by Congress as needing or as being entitled to the tax exemption afforded to those whose services in the military and naval forces was compensated on an altogether different standard—a standard which did not conceive of a normal work week limited to 40 hours of service or of overtime compensation.

3. The just and efficient disposition of the business of the federal courts requires this Court's decisions, and the reasons supporting them, to be accorded by the lower courts more than the formal obeisance rendered *en passant* by the Court of Appeals to *Mitchell* v. *Cohen*. By the certiorari mechanism the Court is largely enabled to restrict its review to selected cases in significant fields, and the opinions in those cases serve as a guide for the determination of related issues by the other federal tribunals, without the necessity of a continuous process of detailed decision and policing by this Court. This system cannot operate effectively in the face of the less-than-lip-service of which the present case appears to us to be a stark example. It is mainly for this reason that we do not hesitate to present to the Court, for the second

time within as many terms, a question concerning the benefits available to wartime temporary members of the Coast Guard Reserve.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

APRIL 1949.

APPENDIX

1. Coast Guard Auxiliary and Reserve Act of 1941, c. 8, 55 Stat. 9:

Sec. 206 [as amended by the Act of July 11, 1941, c. 290, 55 Stat. 584, Section 10; by the Act of June 6, 1942, c. 385, 56 Stat. 329, Section 1(3); and by the Act of November 23, 1942, c. 639, 56 Stat. 1020, Section 2(4)]. Commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Reserve when engaged on active duty, on active duty while undergoing training, on training duty with pay, or when engaged in authorized travel to or from such duty, shall receive the same pay and allowances as are received by commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Naval Reserve of the same rank, grade, rating, and length of service; pay and allowances of cadets of the Reserve shall under the same conditions, for the same purposes, and in the same manner, be assimilated to the pay and allowance of midshipmen of the Naval Reserve. * * *

(14 U.S.C. 306.)

Sec. 207 [as amended by the Act of June 6, 1942, *supra*, Section 1 (4); the Act of October 26, 1942, c. 628, 56 Stat. 990, and the Act of November 23, 1942, *supra*, Sec. 2]. The Commandant, with the approval of the Secretary of the Treasury or of the Secretary of the Navy, while the Coast Guard is operating as a

part of the Navy, is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe, including but not limited to part-time and intermittent active duty with or without pay, and without regard to age, members of the Auxiliary, such officers and members of the crew of any motor-boat or yacht placed at the disposal of the Coast Guard, and such persons (including Government employees without pay other than the compensation of their civilian positions) who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty, as are citizens of the United States, or of its Territories or possessions, including the Philippine Islands, to define their powers and duties, and to confer upon them, appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regular Coast Guard Reserve. When performing active duty with pay, as herein authorized, temporary members of the Reserve shall be entitled to receive the pay and allowances of their respective ranks, grades, or ratings, as may be authorized for members of the regular Coast Guard Reserve. (14 U.S.C. 307.)

SEC. 208. Members of the Reserve, other than temporary members as provided for in section 207 hereof, shall receive the same exemption from registration and liability for training and service as members of the Naval

Reserve, and no member of the Reserve, other than temporary members thereof, shall be a member of any other naval or military organization except the Auxiliary or the Coast Guard as provided for in sections 214 and 215 of this title: *Provided*, That temporary members of the Reserve who may be members of any other military reserve, if ordered to active duty therein, shall be forthwith released from all active duty with the Coast Guard, and their status as temporary members of the Reserve terminated.

(14 U.S.C. 1946 ed., Sec. 308.)

2. Internal Revenue Code:

SEC. 22. GROSS INCOME.

* * * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(13) [As added by Section 117 of the Revenue Act of 1942, c. 619, 56 Stat. 798, as amended by Section 7 (a) of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, and as further amended by Section 141 (a) of the Revenue Act of 1945, c. 453, 59 Stat. 556]. *Additional Allowance for Military and Naval Personal.*—

(A) In the case of compensation received during any taxable year and be-

fore the termination of the present war as proclaimed by the President, for active service as a commissioned officer (or a commissioned warrant officer) in the military or naval forces of the United States during such war, or, in the case of a citizen or resident of the United States, as a member of the military or naval forces of any of the other United Nations during such war, so much of such compensation as does not exceed $1,500.

(B) Compensation received during any taxable year and before the termination of the present war as proclaimed by the President, for active service as a member below the grade of commissioned officer (or commissioned warrant officer) in the military or naval forces of the United States during such war.

(26 U.S.C. 1946 ed., Sec. 22.)

3. Revenue Act of 1945, c. 453, 59 Stat. 556:

SEC. 141. ADDITIONAL ALLOWANCE FOR MILITARY AND NAVAL PERSONNEL.

* * * * *

(b) *Taxable Years to Which Applicable.*—Subparagraph (A) of section 22 (b)(13), as amended by subsection (a) of this section, shall be applicable with respect to taxable years beginning after December 31, 1942; subparagraph (B) thereof shall be applicable

with respect to taxable years beginning after December 31, 1940

* * * * *

4. Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.22(b)(13)-1 [As amended by T.D. 5508, 1946-1 Cum. Bull. 27]. *Compensation of Members of Military and Naval Forces.*—

* * * * *

(b) * * *

The exclusions under section 22 (b)(13) and this section are applicable only to compensation received prior to the termination of the present war to be fixed by proclamation of the President. * * * For the purposes of this section the military and naval forces of the United States include (but are not necessarily limited to) the Army, the Navy, the Marine Corps, the Coast Guard, the Army Nurse Corps, Female, the Navy Nurse Corps, Female, the Women's Army Auxiliary Corps or the Women's Army Corps, the Women's Reserve branch of the Naval Reserve, the Marine Corps Women's Reserve, and the Coast Guard Reserve, including the Coast Guard Women's Reserve.

* * * * *

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